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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAFAEL APARICIO,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G058000

(Super. Ct. No. 19HF0604)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Kimberly Menninger, Judge. Petition granted.

Sharon Petrosino, Public Defender, and Sara Ross and Abby Taylor, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Todd Spitzer, District Attorney and Keith Burke, Deputy District Attorney, for Real Party in Interest.

THE COURT:^{*}

Petitioner Rafael Aparicio filed a petition for writ of prohibition or mandate in which he challenges respondent court's authority to stay his jury trial while the People seek review of a ruling by the magistrate. We agree that respondent court lacks authority to issue a stay in this case and therefore we grant the petition.

FACTS

On May 29, 2019, petitioner Rafael Aparicio's case was set for a preliminary hearing before Judge John S. Adams acting as a magistrate. Over the People's objection, the magistrate allowed petitioner to waive the preliminary hearing. Petitioner was held to answer by the magistrate and on June 10, 2019, the matter was in superior court for petitioner's arraignment on the information.

Although not documented in the superior court record, counsel's declaration in support of the petition states that before petitioner was arraigned on the information, counsel and the People approached the trial court, Judge Nick A. Dourbetas, and the People requested a stay of the proceedings in conjunction with the petition for writ of mandate they intended to file to challenge the magistrate's ruling. According to counsel's declaration, the trial court "stated something to the effect of: 'I tend to agree, I don't think a defendant's speedy trial rights are outweighed by the [District Attorney's] need for a stay; I'm not issuing it.'"

After petitioner's in custody arraignment on the information, a jury trial was set for July 25, 2019. The docket states, "Defendant does not waive statutory time for trial," making August 9, 2019, the 60th and the last day to begin trial absent a finding of good cause for any delay.

^{*} Before O'Leary, P. J., Moore, J., and Ikola, J.

On the same day, the People filed a petition for writ of mandate or prohibition with a request for an immediate stay of the proceedings while they challenged the magistrate's decision to allow petitioner to waive the preliminary hearing over their objection. On June 21, 2019, respondent court issued an order to show cause. The order to show cause ordered petitioner to file a return to the petition by July 12, and for the People to file their reply by August 2, 2019. In addition to issuing an order to show cause, respondent court also granted the People's request for an immediate stay. The entry in the docket states, "Further proceedings in the underlying criminal case are hereby ordered stayed pending determination of the merits of the instant petition and further order by this court." The docket entry also states, "After reviewing the parties' briefs, the Court will set the matter for hearing if deemed appropriate."

On July 1, 2019, petitioner filed "Opposition to Stay Issued on June 24, 2019 [*sic*] [¶] Request for Hearing to be Set as Soon as Possible." According to petitioner's opposition, respondent court did not have authority or jurisdiction to issue orders against itself. Petitioner explained further that courts of appeal have jurisdiction over mandate and prohibition petitions in felony cases after arraignment on the information or indictment. The People filed a "Response to Defense Opposition to Stay" and the matter was before respondent court on July 8 and July 9.

Although the case was before respondent court only to consider petitioner's request to vacate the stay, respondent court said, "Petitioner at this point maintains that the respondent court erred by allowing the real party in interest to waive his right to a preliminary hearing and holding him to answer on criminal charges over the prosecution's objection. [¶] The recommendation at this point, and this is what this court is following, is to order, as we just did, the [order to show cause]. And now the court has heard that evidence. [¶] The court does find that regardless of the reasons for the People not agreeing to waive the right to a preliminary hearing, the plain language provides that

a criminal defendant cannot waive their right, nor can they force the prosecution to waive that right, unless the prosecution agrees.”

Even though both parties said on more than one occasion they did not intend to address the merits of the People’s petition, respondent court continued to address the underlying merits and said, “At this time it’s this court’s position that in the face of prosecutorial objection the respondent court erred by allowing the real party in interest to waive the right to preliminary hearing and holding him to answer over the objection of the People. [¶] It is further at this time found that the court will stay the proceedings until you can have a full-blown hearing on all the merits, because there’s no way to undue [*sic*] what’s happened other than to go forward to trial.”

On the issue of respondent court’s authority to issue the stay, counsel said, “[W]e still remain in a position where the People have not cited any authority. I have been unable to find any authority for this court to issue a stay when the 60-day clock has already started ticking.” After respondent court said, “[T]he Court will find that I do have the power to stay this,” counsel asked, “To perfect the record, your honor, may I inquire as to what the court is relying on for the authority to do so?” Respondent court replied by reading into the record portions of sections 1085, subdivision (a), 1102, and 1103 of the Code of Civil Procedure, sections 859b and 860 of the Penal Code, and a citation to *Richardson v. Superior Court* (2008) 43 Cal.4th 1040 (*Richardson*), and *Deepwell Homeowners’ Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63 (*Deepwell*).

With respect to *Deepwell*, respondent court said, “And so at this point the court has the power, under *Deepwell Homeowners’ Protective Association versus City Council of Palm Springs*, 239 Cal.App.2d, to utilize this power to issue a stay when necessary or proper to complete the exercise of its jurisdiction where denial of the stay would result in depriving an appellant of the fruits of their appeal if they were successful in securing a reversal.”

The court continued to explain the exercise of its power to issue the stay and said, “So, the problem is that, because of where we’ve come and where you are, if I don’t issue the stay then they never get their chance at a preliminary hearing. It cannot be undone. It cannot be fixed, and their remedy is gone. [¶] And so at this point the court is going to exercise it’s [sic] inherent discretion, based on the situation of this case, and the facts and the law as I’ve just cited it to you.”

At the conclusion of the hearing, respondent court elected to preserve the stay. In addition to maintaining the stay, the court also vacated the date set for jury trial.

On July 12, 2019, petitioner filed a petition for writ of prohibition or mandate in this court. On July 19, 2019, this court ordered the People to file informal opposition to the petition. In the informal opposition the People explained the superior court is the appropriate court to consider the writ petition, respondent court has inherent power to issue a stay and respondent court did not overrule a prior ruling by Judge Dourbetas, petitioner’s speedy trial rights do not preclude the issuance of a stay, and even if the stay was improperly issued, respondent court should not be ordered to provide petitioner with a trial within 60 days of June 10, 2019.

On July 25, 2019, this court issued an alternative writ directing respondent court to vacate the stay issued on June 21, 2019, and to decide the merits of the People’s petition for writ of mandate or prohibition no later than August 8, 2019, or show cause before this court. On July 26, 2019, respondent court filed a minute order stating it declined to comply with the alternative writ and explained, “Given the nature of petitioner Aparicio’s claim challenging this court’s jurisdiction to act in this matter, this court respectfully declines to comply with the alternative writ.”

Because the 60th day to start petitioner’s trial is August 9, on August 1, 2019, this court vacated the order issuing the alternative writ, advised the parties the court is considering issuing a peremptory writ of mandate in the first instance and invited the People to file further opposition citing *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36

Cal.3d 171, 180 (*Palma*). In response to the court's *Palma* notice, the People state they "maintain that the superior court properly issued the stay in this case for the reasons set forth in [their] informal response."

DISCUSSION

As a preliminary matter, it is not this court's intention to determine the merits of the People's petition challenging the magistrate's decision to allow petitioner to waive his preliminary hearing. However, Penal Code section 859b¹ states, "Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and *unless both waive that right or good cause for a continuance is found . . . the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads . . .*" (Italics added.)

Once the magistrate accepted petitioner's waiver of the preliminary hearing and he was held to answer, the People had a statutory duty to file the information in the superior court within 15 days from the magistrate's order holding petitioner to answer. (§ 860.) Although petitioner claimed superior court did not have jurisdiction to consider the People's petition challenging the magistrate's ruling because the information had already been filed, "The superior court is the court with jurisdiction to review the actions of a magistrate and issue a writ of mandate to a magistrate." (*Magallan v. Superior Court* (2011) 192 Cal.App. 4th 1444, 1453; *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 803-804.) The fact that the People had a statutory duty to file the information in superior court did not preclude the People from exercising their right to challenge the magistrate's ruling. Section 871.6 allows either the People or the defendant to file a petition for writ of mandate or prohibition in the superior court seeking immediate review of a "violation of Section 859b."

¹ All further references are to the Penal Code unless otherwise indicated.

With the petition for writ of mandate or prohibition properly before respondent court to review the magistrate's ruling, respondent court issued an order to show cause, directed petitioner to file a return, stayed the proceedings, and indicated the matter would be set for a hearing "if deemed appropriate."

However, once respondent court issued the order to show cause and directed petitioner to file a return, "the matter [became] a 'cause,'" (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241) and argument is not determined based on whether respondent court deems it to be "appropriate." Respondent court "must proceed to hear or fix a day for hearing the argument of the case." (Code Civ. Proc., § 1094.) In this case respondent court failed to do so and instead, the court stayed the proceedings and vacated the trial date while petitioner remains in custody indefinitely with no scheduled date for oral argument.

Petitioner contends respondent court exceeded its jurisdiction when it issued the stay on two theories. First, petitioner contends the stay is invalid because respondent court had no legal authority to issue the stay. Second, petitioner contends that even if respondent court had the authority to issue the stay, it exceeded its jurisdiction when it overruled another superior court judge, Judge Dourbetas, who had previously denied the People's request for a stay.

Despite counsel's declaration to the contrary, we find no merit to petitioner's second claim because neither the docket nor the reporter's transcript of the hearing conducted on June 10, indicate that Judge Dourbetas considered or made a ruling on the People's request for a stay on a petition that had not yet been filed.

We do however find merit to petitioner's claim that respondent court lacked authority to issue the stay in this case, and it is worth noting that neither party, nor respondent court were able to cite any authority which states respondent court has the express or inherent authority to issue a stay under these circumstances.

Absent express authorization, the People rely on the notion that respondent court has inherent power to stay the proceedings while their petition for writ of mandate is pending, and they cite to civil cases that we find inapt in this situation because they fail to take into account a criminal defendant's right to a speedy trial under the Sixth Amendment of the United States Constitution, made applicable to the states by the 14th Amendment (*Klopfer v. State of North Carolina* (1967) 386 U.S. 213), article I, section 13 of the California Constitution, and his statutory right to a speedy trial in Penal Code section 1382. As such, we give little weight in the context of this criminal proceeding to the People's citation to *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, a case in which the trial court issued a stay in a personal injury action that was redundant to the automatic stay already pending as a result of a bankruptcy proceeding. *Freiberg* relied on *Walker v. Superior Court* (1991) 53 Cal.App.3d 257, 266, which relied on *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264, but neither case states respondent court has an inherent authority to stay proceedings in a criminal case.

Equally unpersuasive are the two criminal cases cited by the People where the court discussed the authority to stay an enhancement in *People v. Bell* (1984) 159 Cal.App.3d 323, 329, and *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 101, where the court of appeal addressed its own power to stay proceedings at the request of the defendant. (Cal. Rules of Court, rule 8.486(a)(7).)

Likewise, respondent court's recitation to portions of sections 859b, 860, and sections 1085, subdivision (a), 1102 and 1103 of the Code of Civil Procedure also fail to state respondent court has express or inherent authority to issue a stay, as does the court's citation to *Matthews v. Superior Court* (1973) 35 Cal.App.3d 589 (*Matthews*) and *Richardson, supra*, 43 Cal.4th 1040. *Matthews* addresses the defendant's right to a speedy trial after a stay was dissolved in the court of appeal, and *Richardson* fails to address the issue of a stay altogether and appears to have been cited for the proposition that mandamus generally does not lie to control an abuse of discretion.

Nothing in sections 1085 and 1103 of the Code of Civil Procedure which provide for the “Power to Issue” a writ of mandamus or prohibition, or section 871.6 expressly grant authority to respondent court to stay the proceedings in the trial court while it reviews the magistrate’s ruling, and the criminal statutes that apply in this case suggest the proceedings should occur with urgency, not at the convenience of respondent court. Section 859b states in part, “Both the defendant and the people have the right to a preliminary examination *at the earliest possible time . . .*” (Italics added.) If the magistrate violates section 859b, the parties “may file a petition for writ of mandate or prohibition in the superior court seeking *immediate appellate review* of the ruling.” (§ 871.6, (Italics added).) Section 871.6 states that if a petition for writ of mandate or prohibition is filed in the superior court, “Such a petition shall have *precedence over all other cases* in the court to which the petition is assigned.” (Italics added.) Section 871.6 states further that “When the superior court issues the writ and remittitur as provided in this section, the writ shall command the magistrate to *proceed with the preliminary hearing without further delay . . .*” (Italics added.) And if the superior court grants a peremptory writ pursuant to section 871.6, it “shall issue the writ and a remittitur *three court days after its decision becomes final* as to the court if this action is necessary to prevent mootness or to prevent frustration of the relief granted . . .” (Italics added.)

Although the People suggest we should infer that respondent court has the inherent power to issue a stay under these circumstances, inferring inherent authority to issue a stay in this case ignores the fact that section 871.6 expressly provides for a stay upon review of the magistrate’s ruling, but not by the superior court. Section 871.6 states that if the superior court grants a peremptory writ, it is this court, “The court of appeal [that] may stay or recall the issuance of the writ and remittitur.”

If it was the intent of the electorate or the Legislature for respondent court to have unlimited authority to stay pretrial proceedings while reviewing the magistrate’s ruling, it would have drafted section 871.6 in the same manner in which section 1538.5

expressly provides for a stay during pretrial review and states, “the trial of a criminal case shall be stayed to specified date pending the termination in the appellate courts . . . of the proceedings provided for in this section” (§ 1538.5, subd. (l).) Cognizant of the potential prejudice to an incarcerated defendant, subdivision (k) provides for the defendant’s release from custody if pretrial review is by the People.

Respondent court’s reliance on *Deepwell, supra*, 239 Cal.App.2d 63, another civil case that fails to address the defendant’s right to a speedy trial, is also unpersuasive.

In *Deepwell*, petitioners filed a petition for writ of mandate to annul the city council’s resolutions granting a building permit. When the trial court sustained respondent’s demurrer to the amended petition without leave to amend, judgment was entered in favor of respondents and petitioners filed a notice of appeal and a petition for writ of supersedeas.

Respondent court cites *Deepwell* for the proposition that “the inherent power of the appellate court will apply where the effect of the judgment, as here, is such that a stay is ‘necessary or proper to the complete exercise of its appellate jurisdiction [citations]’ [citation] and where denial of a stay would result in depriving an appellant of the fruits of his appeal should he be successful in securing a reversal of the judgment.” (*Deepwell, supra*, at p. 65.)

Respondent court’s reliance on *Deepwell* is not only misplaced, but it highlights the distinction between the application of a stay in the context of the court’s appellate jurisdiction, which is expressly authorized in section 1243, and a stay requested in the context of writ proceedings in which a party seeks immediate extraordinary relief. In this case, section 871.6 states the “petition shall have precedence over all other cases in the court to which the petition is assigned,” which suggests respondent court is required to take expedited judicial action, not stay the matter for prolonged consideration.

Relying on *Deepwell*, respondent court said, “[I]f I don’t issue the stay then they never get their chance at a preliminary hearing. It cannot be undone. It cannot be fixed, and their remedy is gone.” (Italics added.)

But respondent court’s belief the matter must be stayed because the People are entitled to a remedy, which section 871.6 states is “to proceed with the preliminary hearing without further delay,” does not explain or justify the stay in this case. Respondent court’s ability to grant relief and order the preliminary hearing to go forward is not dependent on the court issuing a stay. Deciding the merits of the petition and protecting petitioner’s right to a speedy trial are not mutually exclusive propositions. The issue to be determined before respondent court, which it seems to have already decided, appears to require no witnesses, no testimony, and no stay, to resolve a pure question of law, i.e., *Were the People entitled to a preliminary hearing?* Unlike an appeal, writ relief is intended to be an expedited judicial action, and in fact, section 1088 of the Code of Civil Procedure and *Palma* authorize an accelerated procedure for issuance of a peremptory writ in the first instance when there is no factual dispute, there has been clear error under well-established principles of law, or there is urgency requiring acceleration of the normal process. (*Lewis v. Superior Court, supra*, 19 Cal.4th 1232, 1258.)

Contrary to resolving the People’s petition with urgency, respondent court stayed the proceedings, vacated petitioner’s trial date, and failed to set a date for oral argument as petitioner remains in custody with three days before his statutory right to a speedy trial expires.

Based on the facts and circumstances of this case, we find that respondent court does not have inherent authority to stay proceedings that would frustrate a defendant’s right to a speedy trial while it reviews the magistrate’s ruling and permits oral argument only “if deemed appropriate.”

Finally, because the comments by respondent court on July 9, 2019, appear to indicate that respondent court may have prejudged or determined the merits of the

petition before oral argument on the order to show cause and before petitioner had an opportunity to file a return, on the court's own motion and in the interest of justice, all further writ proceedings shall be conducted by a superior court judge other than Judge Menninger. (Code Civ. Proc., § 170.1, subd. (c).) The clerk of this court is directed to transmit a copy of this opinion to the presiding judge of the superior court, and the presiding judge is directed to appoint a superior court judge other than Judge Menninger to conduct all further proceedings on the petition for writ of mandate or prohibition filed by the People on June 10, 2019.

DISPOSITION

Let a peremptory writ of mandate issue ordering respondent court to vacate forthwith the stay issued on June 21, 2019. The presiding judge of the superior court is directed to appoint a superior court judge other than Judge Menninger to conduct all further proceedings on the petition for writ mandate or prohibition filed by the People on June 10, 2019. It is further ordered that the superior court judge assigned to decide the merits of the petition give the parties notice and an opportunity to be heard before deciding the merits of the petition no later than August 8, 2019.

In the interest of justice, the opinion in this matter is deemed final as to this court forthwith and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)